

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHERMEIN DELMONT COOPER,

Defendant-Appellant.

UNPUBLISHED

April 17, 2007

No. 266171

Bay Circuit Court

LC No. 04-010458-FH

Before: Saad, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). He was sentenced as a third-offense habitual offender, MCL 769.11, to 38 months to 40 years in prison. He appeals as of right. We affirm.

Defendant's conviction arose out of an undercover drug operation involving a confidential informant. The informant wore a hidden transmitter while purchasing cocaine from defendant. The transmitter recorded the informant's statements during the purchase. At trial, the prosecutor played the portion of the recording that reflected the cocaine purchase. During jury deliberations, the jury asked to hear the entire recording. The trial court then played the entire recording, which included the informant's remarks to a police officer as well as a subsequent police radio transmission.

Defendant argues that the portions of the recording that contained the informant's remarks and the radio transmission were inadmissible. Specifically, defendant maintains that those portions were irrelevant, hearsay, and unduly prejudicial. However, defendant neither objected to the admission of the entire recording at trial nor to the playing of the entire recording for the jury. Accordingly, our review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Here, no plain error occurred. Contrary to defendant's assertions, the entire recording was relevant. MRE 401. Further, the challenged portions of the recording were not hearsay. A statement is not hearsay unless it is offered to prove the truth of the matter asserted. MRE 801. The portions that defendant challenges, namely, the informant's remarks and the police radio transmission, were not offered to prove the truth of the matters asserted in those remarks. Further, while portions of the recording not originally played were arguably prejudicial in that they gave the impression that defendant was a dangerous man, it cannot be said that the

probative value of the evidence was substantially outweighed by the danger of unfair prejudice. See MRE 403; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002) (stating that unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence). Although the jury had not previously heard the entire recording at issue, the recording had been admitted into evidence. It was not plain error to play the recording.

Even if the trial court erred when it permitted the jury to hear the entire recording, we would conclude that any error was harmless in light of the overwhelming evidence against defendant. Testimony established that the supervising police officer gave the informant \$200 in marked bills. The informant testified that he called defendant to arrange the purchase, and that defendant arrived at the agreed meeting place in a green car. The informant further testified that he gave the \$200 to defendant in exchange for a plastic bag that contained cocaine.

In addition, a state trooper testified that, as he chased the green car shortly after the drug purchase, he observed someone throw something out of the car from the front passenger seat, which was occupied by defendant. The trooper also testified that he found \$200 at the location where the object was thrown out of the car. Evidence demonstrated that this was the same \$200 that the police provided to the informant and that the informant gave to defendant for the cocaine. Because this evidence overwhelmingly established that defendant sold the cocaine in the bag to the informant, we conclude that any error in the admission of the recording was harmless. Therefore, no relief is warranted. *Carines, supra* at 763. Furthermore, even if the error were not harmless, we would decline to reverse because the alleged error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763, 772.

Defendant next contends that the prosecutor impermissibly vouched for defendant's guilt by saying, "we think you'll conclude as we did that [defendant] is guilty." Specifically, defendant finds fault with the use of the phrase, "as we did." Because defendant did not make a timely objection to the comment, our review is for plain error affecting defendant's substantial rights. *People v Goodin*, 257 Mich App 425, 431; 668 NW2d 392 (2003).

"[W]e consider issues of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context" *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may properly argue the guilt of the defendant, but may not support the argument with the authority or prestige of the prosecutor's office. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). Although the prosecutor referred to his office, he did not invoke the authority or prestige of the office in arguing defendant's guilt. Rather, the context demonstrates that the prosecutor simply argued that the trial evidence warranted a conclusion that defendant was guilty.

Lastly, defendant argues that his counsel was ineffective for failing to object to the admission of the recording, the playing of the recording, and the alleged prosecutorial vouching. No error having occurred in the ways set forth by defendant, his ineffective assistance argument

necessarily fails. Counsel cannot be faulted for failing to raise meritless objections. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski

I concur in result only.

/s/ Joel P. Hoekstra